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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-841

THE HONORABLE CALE J. HOLDER,
United States District Judge,
Petitioner,

—v.—

ARTHUR BANKS,
Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE INDIANA CIVIL LIBERTIES UNION, *AMICI CURIAE*

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—v.—

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Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 42 of the Rules of the United States Supreme Court, the American Civil Liberties Union and the Indiana Civil Liberties Union respectfully move for leave to file a brief amici curiae in the above entitled case. Counsel for the respondent has consented to the filing of this brief; counsel for the petitioner has orally denied such consent.*

The American Civil Liberties Union is a nation-wide, non-partisan organization of over 250,000 members dedicated solely to the protection of those liberties safeguarded by the Bill of Rights. The Indiana Civil Liberties Union is an affiliate of the ACLU, functioning within the State of Indiana, where this case arose.

* The respondent's letter of consent has been filed with the Clerk of the Court.

The issues in this case are of great interest to the ACLU for two reasons. First, the actions of the petitioner in this case seriously burden the criminal defendant's rights, under the First, Fifth and Sixth Amendments, to counsel of his choice. They equally burden the right of free expression available to members of the bar no less than to citizens generally. If the action of the District Court is ultimately upheld, these various constitutional safeguards are jeopardized.

Our second interest relates to the ACLU itself. At any given time, the ACLU and its forty-eight affiliates throughout the nation, provide counsel in approximately 5,000 cases involving civil liberties issues. Counsel is provided without fee by staff attorneys and frequently by hundreds of volunteer attorneys. Often our attorneys handle cases in jurisdictions in which they are not admitted to practice. They appear in conjunction with local counsel, but their admission must be secured on a *pro hacc vice* basis, in the discretion of the court, state or federal. If that discretion can be exercised in the manner attempted below, then in many situations our attorneys will have to circumscribe their First Amendment rights as a condition to handling our cases, and our clients will have to settle for being represented by attorneys willing to be so circumscribed.

For these reasons, we seek to participate in the Court's resolution of the issues in this case.

Respectfully submitted,

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March 31, 1974

IN THE

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OCTOBER TERM, 1973

No. 73-841

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ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE INDIANA CIVIL LIBERTIES UNION, *AMICI CURIAE*

The interest of *amici* is set out in the preceding motion for leave to file brief *amici curiae*.

Statement of the Case

The basic fact situation, which is outlined in detail in respondent's brief, is as follows:

Respondent was an inmate in the federal penitentiary at Terre Haute, Indiana when he was indicted on December 14, 1972 for assaulting a guard. He sought to retain Mr. William Kunstler of New York as his lawyer. Another local attorney, Mr. Brent Barnhart, represented him at

arraignment and filed certain pre-trial motions on his behalf. On March 21, 1973 Mr. Kunstler filed a motion for leave to appear as Banks' counsel. That motion as well as the discovery motions filed earlier were set for a hearing on April 1, 1973 before petitioner.

At the April 1, 1973 hearing, petitioner questioned Mr. Kunstler about certain public statements he had allegedly made about the case. The statement of the case outlined in petitioner's brief seeks to create the impression that Mr. Kunstler regularly travelled to Terre Haute and Indianapolis to issue numerous public statements about the case. In fact, the public statements or comments offered in evidence consisted only of the following:

1. On February 9, 1973, Mr. Kunstler appeared before a high school student audience in Terre Haute and spoke about the draft and war-resistance and about prisons, and about the need for sympathizers of Mr. Banks to come to his trial. He later went to a cocktail party reception at a law office in Indianapolis and was sought out and interviewed by a reporter from the *Indianapolis Star*. A news story about that interview was published in the *Star* on February 10, 1973 at p. 31.

2. The government offered in evidence a press release issued by a committee that was supporting Mr. Banks which contained various remarks by Mr. Kunstler about Mr. Banks. There was no proof as to whether the quotes were accurate, whether their release was authorized, whether any publicity resulted or whether anyone in Terre Haute in fact read them.

3. The court made available to the government a transcript of a news broadcast from a local radio station containing public statements by Mr. Kunstler. They apparently made no reference to the Banks case other than to urge people who supported Mr. Banks to come to his trial.

4. Time Magazine of February 26, 1973 contained a story about the Banks case in which Mr. Kunstler is quoted as saying: "The moment he went into prison he was doomed."

Based on this material, the petitioner questioned Mr. Kunstler and Mr. Banks about the prejudicial effect of the remarks on the pending trial. Petitioner's remarks, quoted at length in respondent's brief, shows that he disapproved of Mr. Kunstler's views on the draft, amnesty and other public issues and thought Mr. Banks would be injured by having a controversial lawyer like Mr. Kunstler represent him. It might be, according to petitioner, like "carrying a monkey on your back." Petitioner also sought to introduce some material that indicated that the Angela Davis defense fund was supporting the case—which was totally contrary to fact. Thereafter, the petitioner denied Mr. Kunstler's motion to appear as counsel in this action.

All of the other statements quoted by petitioner in his brief (at pp. 9-12) occurred after the April 1, 1973 hearing and have no relevance to this appeal. They show Mr. Kunstler's justifiable anger at being dismissed from the case and their quotation by petitioner on this appeal is totally improper.

Subsequent to this Court's grant of the petition for certiorari, Mr. Banks was released on bail due to a habeas corpus petition filed on his behalf by Mr. Kunstler.

Summary of Argument

The Sixth Amendment guarantees a defendant a fair opportunity to secure counsel of his own choice. In the context of this action, the guarantee means that a defendant must be afforded the right to secure out-of-state counsel of his choice. Many courts have struck down restrictive rules and regulations that undermine the right of a defendant or litigant to engage out-of-state counsel.

The problem is particularly acute when the defendant's claim or defense is unpopular and assistance by an out-of-state counsel may be the only means available for vindication. In the civil rights movement in the early 1960's, the availability of out-of-state counsel was necessary to protect the First and Fourteenth Amendment rights of citizens in the South. In this case also, the claim and defense of the defendant is unpopular and the assistance of skilled and sympathetic counsel from outside the jurisdiction is necessary to protect his rights. Out-of-state counsel also aids in the administration of justice since his participation may lead to more efficient presentation of the case and reduces the likelihood of disorder in the court.

There is no state interest which justifies the denial of defendant's selection of out-of-state counsel. There was no showing of any trial delay nor could counsel be accused of any serious misconduct. The violation of pre-trial publicity rules cannot justify the denial of counsel. In the first place there was no violation of the rules. Secondly, the rules cannot be interpreted to cover the brief comments of counsel involved in the instant case. Finally, the rules do not

provide for the sanction of denying a defendant out-of-state counsel of his choice.

To the extent that the fair trial-free press rules forbid comments by an attorney on his client's innocence, they violate the First Amendment and cannot be enforced. There must be an imminent and direct danger to the administration of justice before comments by an attorney can be punished in any way. That clearly is not the situation in the present case.

ARGUMENT

This case presents a vital problem in the administration of justice in this nation: can a trial judge deny a defendant out-of-state counsel of his choice only because the attorney has made public statements about the case which the trial judge disapproves of? Petitioner's actions under review threaten to undermine the accepted practice of attorneys travelling from one jurisdiction to another because their talents, expertise or sympathies are enlisted by defendants who are not satisfied with local counsel. If petitioner's order is upheld, it could mean that expert counsel for minority groups, specialists in different phases of federal law, outstanding criminal lawyers, or constitutional law experts could be barred from practicing in jurisdictions where their talents are most needed merely because they may have made public statements about the case in issue.

If this Court reverses the Court of Appeals decision below, it would not only violate the First Amendment rights of the attorney and the Sixth Amendment rights of the respondent, it would also threaten the long-standing tradition

of every American attorney being available to anyone in the nation who might need his or her services, a practice exemplified by such legendary practitioners as Clarence Darrow or John W. Davis—a tradition as old as Andrew Hamilton's defense of John Peter Zenger in colonial times.

I.

The petitioner's denial of counsel of his choice to respondent is an abridgement of respondent's Sixth Amendment right to counsel, his Fifth Amendment right to due process, and his First Amendment right of expression and association.

A. *A Defendant's Right to Out-of-State Counsel of His Choice Is Required by the Sixth Amendment.*

The application of the Sixth Amendment right to counsel to the circumstances of this case demands that respondent be allowed the right to counsel of his own choosing.* As this Court said in *Powell* v. *Alabama*, 287 U.S. 45, 53 (1932) " . . . a defendant should be afforded a fair opportunity to secure counsel of his own choice." See also *Glasser* v. *United States*, 315 U.S. 60, 70 (1942); *In re Groban*, 352 U.S. 330, 332 (1957).

As in the case at bar, courts have held that the substitution of court-appointed counsel over counsel of defendant's choice is a violation of constitutional rights. See *Reickauer*

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* Access to legal advice is also protected by the First Amendment. See *Brotherhood of R.R. Trainmen* v. *Virginia State Bar*, 377 U.S. 1 (1964); *NAACP* v. *Button*, 371 U.S. 415 (1963).

v. *Cunningham,* 299 F.2d 170 (4th Cir., 1962); *Lefton* v. *City of Hattiesburg, Mississippi,* 333 F.2d 280 (5th Cir., 1964). In *Releford* v. *United States,* 288 F.2d 298 (9th Cir., 1961), the court specifically proposed a continuance as the remedy for the court appointment of counsel over defendant's objections in order to allow the defendant to obtain the services of the counsel of his choice. Other courts have acknowledged the right to counsel of choice in *dicta.* See *Chandler* v. *Fretag,* 348 U.S. 3, 9-10; *United States* v. *Jones,* 369 F.2d 217 (7th Cir., 1966), *cert. denied sub nom. Watkins* v. *United States,* 386 U.S. 944 (1967).

This right has been recognized in cases where the counsel of choice is a non-resident and must appear *pro haec vice.* In *Cooper* v. *Hutchinson,* 184 F.2d 119 (3rd Cir., 1950), the court found that out-of-state lawyers who had been admitted *pro haec vice* in a criminal case could not be removed from the case without violating the defendant's constitutional rights. In *United States* v. *Bergamo,* 154 F.2d 31 (3d Cir., 1946), the court specifically held that denial of the request for *pro haec vice* appearance was an abridgment of the defendant's Sixth Amendment rights:

> To hold that defendants in a criminal trial may not be defended by an out-of-the-district counsel selected by them is to vitiate the guarantees of the Sixth Amendment. 154 F.2d 31, 35.

These opinions recognize that the defendant's evaluation of effective representation of his interests is entitled to great deference. Thus a defendant's objection to court appointed counsel may well justify the dismissal of that counsel when the petitioner demonstrates that that attorney may not adequately represent his interests. See *Glasser*

v. *United States,* 315 U.S. 60 (1941) (denial of Sixth Amendment rights to allow appointment of counsel with interests in conflict with those of defendant). Court accommodation to the defendant's judgment includes an obligation to make a meaningful inquiry into defendant's objections to court appointed counsel as part of the Sixth Amendment right. See *United States* v. *Seale,* 461 F.2d 345 (7th Cir., 1972). It also requires that a request for a continuance be granted in order to allow defendant's counsel to meet prior client commitments and still represent the defendant. See *Heard* v. *Gomez,* 218 F. Supp. 228 (S.D. Tex. 1962), *aff'd,* 321 F.2d 88 (5th Cir., 1963).

The constitutional requirement of court deference and accommodation to defendant's choice of counsel cannot be lessened by a defendant's choice of an out-of-state lawyer. In *Sanders* v. *Russell,* 401 F.2d 241 (5th Cir., 1968), the court struck down a Mississippi rule limiting *pro haec vice* appearances of out-of-state lawyers and noted that a showing of good standing was sufficient to require admission before a District Court in non-fee generating civil rights cases:

> In our view the District Court must grant *pro haec vice* admissions in such cases upon a showing that an individual lawyer is a member in good standing of the bar of some state, without limitation in terms of years of practice or admission. 401 F.2d 241, 247.

In *Spanos* v. *Skouras Theatres Corp.,* 364 F.2d 161 (2d Cir., 1966) the court recognized that the increased specialization and high mobility of today's bar presented a compelling argument for allowing the admission of an out-of-state anti-trust lawyer to appear with a New York attorney

in an anti-trust suit and that the existence of a statutory cause of action included a right to its effective legal assertion:

> We are persuaded . . . that where a right has been conferred on citizens by federal law, the constitutional guarantee against its abridgment must be read to include what is necessary and appropriate for its assertion. In an age of increased specialization and high mobility of the bar, this must comprehend the right to bring to the assistance of an attorney, admitted in the resident state, *a lawyer licensed by "public act" of any other state who is thought best fitted for the task, and to allow him to serve in whatever manner is most effective,* subject only to valid rules of court as to practice before them . . . Indeed, *in instances where the federal claim or defense is unpopular, advice and assistance by an out-of-state lawyer may be the only means available for vindication.* 364 F.2d at 170 [Emphasis added].

The same reasoning certainly applies to a criminal action where the stakes for the defendant are very high indeed. And the very nature of a criminal case necessarily means that the cause is an "unpopular" one. This is even more likely in this case where the defendant has been jailed for refusal to serve in the armed forces after having been denied conscientious objector status. Whatever one may think of his action, his actions were surely highly controversial and could easily evoke highly emotional responses. Moreover, Mr. Kunstler's widespread reputation in the field of civil rights cases may well have led defendant to a judgment that Mr. Kunstler's expertise made him the attorney best suited to represent him.

The experience of the civil rights movement in the early 1960's shows the importance of freely permitting out-of-state attorneys to appear in "unpopular" cases. The Southern bar was totally antagonistic to the mere assertion of rights on behalf of blacks. See M. Frankel "The Alabama Lawyer, 1954-1964," 64 *Colum. L. Rev.* 1243 (1964). Most Southern lawyers would not represent blacks or civil rights workers arrested for violating local laws. See J. Oppenheim, "The Abdication of the Southern Bar," in L. Friedman ed. *Southern Justice* 127-135 (1965). The few lawyers who would handle civil rights cases were subject to economic pressure, disciplinary proceedings by local groups and even physical violence. See D. Pollitt, "Counsel for the Unpopular Cause," 43 *N. Car. L. Rev.* 9 (1964). It was only the availability of out-of-state counsel with the skills, interest and belief in the civil rights movement that led to vindication of the First and Fourteenth Amendment rights of local citizens. Federal courts were quick to protect the rights of those clients and their out-of-state lawyers. See *Sobol* v. *Perez*, 289 F. Supp. 392 (E.D. La., 1968), *Sanders* v. *Russell, supra, Lefton* v. *City of Hattiesburg, supra.*

The assumptions behind the decisions upholding the right of out-of-state lawyers to appear in civil rights cases apply equally in this case. It is not enough to say that some other local counsel will be able to defend the action. A defendant has the right to choose counsel who has both the skills and a sympathetic interest in his plight. Sometimes local counsel may not be willing to make certain arguments on behalf of his client which an out-of-state lawyer would gladly make. In the civil rights cases, many local counsel would not challenge the systematic exclusion of blacks from jury lists. See *United States ex rel. Goldsby* v. *Harpole*, 263

F.2d 71, 82 (5th Cir., 1959), cert. den. 361 U.S. 850 (1959). Today some local counsel may not raise the issue of prosecutorial abuse of discretion, illegal wiretap of counsel, the production of exculpatory material under *Brady* v. *Maryland,* 373 U.S. 83 (1963), or other governmental misconduct which might serve as a defense to the charges. Out-of-state lawyers familiar with such arguments may be better able to represent a client in many situations.*

Representation by counsel of one's choice, rather than unwanted appointed counsel, aids in the administration of justice in many ways. It may lead to more efficient presentation of a case if rapport exists between counsel and client. There is less likelihood of disorder in such cases. As a recent report of the Association of the Bar of the City of New York points out:

> A client who has confidence in his attorney and feels he is being properly represented is more likely to listen to his lawyer's recommendations or respond to his suggestions on how he should behave himself in the courtroom. If a defendant is represented by someone in whom he does not have faith, the danger of trial disruption is greatly increased. *Disorder in the Court, A Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct,* 136 (1973).

Thus, in terms of defendant's rights and the administration of justice, representation by out-of-state lawyers

* It should be noted that in the instant case Mr. Kunstler was able to have Mr. Banks released from prison on February 15, 1974 through a writ of habeas corpus. It is doubtful that local counsel could have or would have been able to.

should always be permitted except where some competing and compelling governmental interest can be shown.

B. *There Is No State Interest Which Justifies Denial of Respondent's Selection of Out-of-State Counsel of His Choice.*

Various reasons have been proposed to justify denial of the right to choose out-of-state counsel. They include (1) possible trial delay; (2) serious misconduct by out-of-state counsel; (3) violation of the Code of Professional Responsibility. None of these reasons are applicable in the present case.

(1) *Trial Delay*: Some courts have denied a continuance to allow defendants to obtain the services of chosen counsel when such defendants have shown lack of diligence in obtaining counsel, *United States ex rel. Carey* v. *A. T. Rundle,* 409 F.2d 1210 (3rd Cir., 1969), cert. denied, 397 U.S. 946 (1970) (denial of third continuance request by defendant after he had had over one month to obtain counsel and was unable to find a private attorney); when such defendants have demonstrated a lack of cooperation with first counsel of choice, *United States* v. *Pigford,* 461 F.2d 648 (4th Cir., 1972) (denial of motion for continuance to obtain new attorney when defendant had ignored several requests of original counsel to assist in preparation of case and where no witness subpoenas had been issued); and where such defendants have not consistently objected to appointed counsel, *United States* v. *Hampton,* 457 F.2d 299 (7th Cir., 1972) (denial or motion where defendant had previously expressed satisfaction with court-appointed counsel and requested private counsel on morning of trial due to sudden acquisition of funds for private attorney).

None of these factors is present in the instant case. Rather the government and the petitioner have attempted to thwart the consistently cooperative relationship of attorney and client by initially refusing to accommodate hearing dates to grant Mr. Kunstler a necessary 24 hours to meet his other commitments and by giving dubious notice of such hearing. There was absolutely no showing that there would have been any unnecessary delay in trying respondent's case if Mr. Kunstler had represented him.

Indeed the circumstances in which courts have refused to make such accommodations are readily distinguishable from the case at bar. In this case defendant Banks secured a commitment from Mr. Kunstler and maintained a consistent interest in being represented by him. Mr. Kunstler also demonstrated a good faith interest in representing Mr. Banks and due diligence in legal efforts on defendant's behalf. There is no proof in the record that Mr. Kunstler would not have been available for the scheduled trial of respondent in May, 1973.

(2) *Serious Misconduct*: There have been cases where serious misconduct, such as tampering with evidence, has been held to justify the denial of *pro haec vice* appearance. For example, in *United States* v. *Madsen,* 148 F. Supp. 625 (D. Alaska 1957), the court refused to allow a non-resident attorney to represent a criminal defendant after the attorney without authorization had been discovered inspecting the car in which defendant's alleged victim had been shot and where the police found that a bullet hole in the car had apparently been altered by the attorney. The court's finding that the attorney was "wholly lacking in the character requisite for an officer of the court" was indeed justified. In *State* v. *Kavenaugh,* 52 N.J. 7, 243 A.2d 225 (1968) cert.

den. sub nom. *Matzner v. New Jersey*, 393 U.S. 924 (1968), the foreign lawyer sent a letter containing outragious charges about the case to 150 state and federal officials at the eve of trial. It was widely publicized in the press. The sending of the letter violated a specific court order against pre-trial publicity. The lawyer was not permitted to appear in the case. However, the New Jersey Supreme Court's opinion suggests that the misconduct was so serious that a local lawyer would probably have been barred from appearing in the case if he had acted in the same way.

There is nothing comparable to the Kavanaugh case in this action. Mr. Kunstler's remarks were remote in time and place from the trial and violated no court order. There is no basis for relying on the Kavanaugh case to justify his dismissal from the Banks case.

(3) *Unethical Conduct*: The chief reliance of petitioner in refusing to permit Mr. Kunstler to appear in this case was on the fact that he allegedly violated the strictures on pre-trial publicity contained in DR 7-107 and Rule 27 of the District Court of the Southern District of Indiana. The simple answer to that contention is that assuming any sanction should be imposed, it must be done in disciplinary proceedings by the appropriate bar committee of a lawyer's home jurisdiction, not through denial of *pro haec vice* admission. In addition the disciplinary rule is not designed to cover the brief remarks made by Mr. Kunstler so remote in time and place from the trial. In any event if the rules are interpreted to cover this situation they violate the First Amendment, as explained in Point II below.

Petitioner quotes extensively from various reports on pre-trial publicity such as the Kaufman Committee report,

45 F.R.D. 391, and the Reardon Committee report which lead to DR 7-107. But he does not cite a single word in those reports that suggests that a proper sanction for violation of the rules is the barring of out-of-state counsel.

We have already demonstrated the importance of a defendant selecting counsel of his choice whether in or out-of-state. That interest can be overridden only by a compelling state interest such as a direct and imminent threat to the administration of justice. Nothing in the record in this case demonstrates any such threat. If the petitioner's position is upheld it would mean that any minor or insignificant deviation from the Canons or rules could serve as the basis for denying *pro haec vice* admission. For example, DR 7-106 (c)(1) forbids a lawyer from stating any irrelevant matter before a court. Should the violation of that rule lead to a defendant losing out-of-state counsel of his choice?

In addition, Mr. Kunstler's remarks did not violate DR 7-107. He commented generally about the case and Mr. Banks and made some remarks about his political philosophy. There is no hint that potential jurors in Terre Haute read or knew about the February 10, 1973 story on p. 31 of the Indianapolis Star or saw the press release introduced below. There is absolutely no showing that the state's right to a fair trial was jeopardized in any way. Mr. Kunstler did not discuss the evidence he planned to introduce nor the witnesses he planned to call. The most that could be said is that he commented on his client's innocence. But, surely such a statement constitutes a right-of-reply to the prosecutors indictment. Surely the rules were not designed to cover such remarks when intermixed with general political statements. There is simply no basis for claiming that Mr. Kunstler's remarks were so serious a violation of the rules that the fairness of the trial was threatened.

C. *The Association of Local Counsel With Mr. Kunstler Satisfied Any Legitimate Interest in Insuring Familiarity With Local Rules.*

Each federal district court has a legitimate interest in making sure that counsel is available within its jurisdiction to obtain service of papers and to be available for necessary conferences about the case. Local counsel should also be available to familiarize out-of-state counsel with local rules and practice.

If these interests are satisfied—and the record is clear that they were in the instant case—the local federal court can have no other interest in barring a defendant from selecting an out-of-state lawyer of his choice. As the New York City Bar Association states:

> While the state's need for an orderly trial is important, the right of an individual to counsel of his choice cannot be denied unless some compelling state regulatory interest can be demonstrated. The state's interest must be asserted in a reasonable manner and in our view only through the least drastic means required to protect the integrity of the court proceedings—such as requiring the association of local counsel.
>
> We conclude that a court cannot and should not bar an out-of-state lawyer from appearing if 1) he is willing to have local counsel associate himself with the case to familiarize the foreign lawyer with local practice, and to obtain service of papers, and 2) the out-of-state lawyer has no present disability or limitation on his right to practice in his own state.
> *Disorder in the Court,* supra 168.

II.

Respondent's right to counsel and due process rights cannot be abridged on the basis of his and or his attorney's valid exercise of First Amendment rights.

A. *Mr. Kunstler's Statements About This Case Are Protected by the First Amendment.*

Only speech which presents a "clear and present danger" to the administration of justice may be prohibited. *Bridges* v. *California*, 314 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Harney*, 331 U.S. 367 (1946); *Wood* v. *Georgia*, 370 U.S. 375 (1962). This test has led courts to find First Amendment protection for a wide range of speech both by the press and by parties involved in litigation. Such protection extends to criticism of a judge and trial procedures in a case of forcible detention, *Craig* v. *Harney, supra;* a newspaper editor's criticism of a judge if he decides to grant probation to labor union members and the publication of a telegram from a union official to the Secretary of Labor threatening a strike if the court's decree is not enforced, *Bridges* v. *California, supra;* harsh criticism of a judge's dismissal of rape case indictments, *Pennekamp* v. *Florida, supra;* issuance of press releases by a local sheriff accusing judges of race agitation during pending grand jury investigation, *Wood* v. *Georgia, supra.*

This Court in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), noted that the courts have the power and obligation to make rules to insure the fair administration of justice:

> . . . The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel

> for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. 384 U.S. at 363.

But such rules cannot be made at the expense of the valid exercise of First Amendment rights. For these reasons the Seventh Circuit has struck down a blanket prohibition on extra-judicial comment by defense counsel during pending litigation as a clear First Amendment violation. See *In re Oliver*, 452 F.2d 111 (7th Cir., 1971). In passing on the overbreadth question the court noted that its role in passing on court rules was similar to that of a court passing on statutes, and that such rules were subject to similar challenges:

> [There is a distinction between the court's adjudicative role] in which it is restricted to determining relative rights between parties clearly subject to its jurisdiction based upon facts then made known to the court, and the function of a court in an essentially legislative role, in which it adopts broad rules, perhaps having their greatest effect on parties not before it, based on facts largely anticipated. In this latter function courts should be treated more like legislatures than courts in that their rule-making decisions should be subject to the same sort of challenges permitted for statutes. 452 F.2d at 113-14.

The Seventh Circuit has also struck down an overbroad court order prohibiting defense attorneys from making statements in a criminal case arising under the Selective Service Act while recognizing the "clear and present danger" test for determining the validity of such rules:

> We hold that before a trial court can limit defendants' or attorneys' exercise of First Amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is "a serious and imminent threat to the administration of justice." *Chase* v. *Robson,* 435 F.2d 1059, 1061 (7th Cir., 1970).

And other courts have struck down as overbroad court rules dealing with First Amendment press rights. See *Dorfman* v. *Meiszner,* 430 F.2d 558 (7th Cir., 1970) (court rule prohibiting photographs in courtroom and environs held to be overbroad); *United States* v. *Dickinson,* 465 F.2d 496 (5th Cir., 1972) (court order prohibiting reporting of testimony taken in open court hearing to determine the legitimacy of state prosecution held to be overbroad).

A narrow test for such prohibitions is necessary because both the government and the public have an interest in inviting public interest in and comment on the operation of the criminal justice system. In *In re Sawyer,* 360 U.S. 622 (1959), the Supreme Court took specific note of the interest in permitting the out-of-court speech of a defense attorney in a Smith Act case, noting that such speech could be part of a healthy criticism of the law:

> We start with the proposition that lawyers are free to criticize the state of the law. Many lawyers say the rules of evidence relative to the admission of statements by those alleged to be co-conspirators are overbroad or otherwise unfair and unwise; that there are dangers to defendants, of a sort against which trial judges cannot protect them, in a trial of numerous

> persons jointly for conspiracy; and that a Smith Act trial is apt to become a trial of ideas. Others disagree. But all are free to express their views of these matters . . . And surely permissible criticism may as well be made to a lay audience as to a professional; oftentimes the law is modified through popular criticism. 360 U.S. at 631.

The public often views the prosecution as representing the public interest and does not always maintain the presumption of innocence against the accused. For this reason, a brief comment by the accused or his attorney maintaining his innocence serves a useful purpose by reminding the public of the presumption of innocence. See Goldstein, "The State and the Accused: The Balance of Advantage in Criminal Procedure," 69 *Yale L.J.* 1149 (1960). It cannot be considered a "serious and imminent threat to the administration of justice." Thus, it cannot serve as the basis for any disciplinary sanction and surely not as the basis for depriving a defendant of the Sixth Amendment right to counsel of his choice.

Thus, DR 7-107 and Rule 27 cannot be interpreted to forbid a brief comment on the innocence of the accused by his attorney at any time. It surely cannot be invoked to punish such remarks intermixed with protected First Amendment statements made by an attorney months before a trial and reported in a back page of a newspaper 95 miles from where the case is to be tried. Nothing in the *Sheppard* opinion justifies such a broad expansion of any pre-trial publicity rule.

The petitioner also focuses on Mr. Kunstler's remark urging Mr. Banks' supporters to come to the trial. Mr. Kunstler did not urge that supporters disrupt the proceeding in any way. There is no law or rule or regulation that forbids lawyers from urging a defendant's friends or supporters to attend his trial. Such a comment cannot serve as the basis for any sanction whatsoever, let alone the loss of defendant's Sixth Amendment rights.

B. *The Political Views of Respondent and His Attorney Are Protected by the First Amendment and Cannot Be Made the Basis for Abridgement of Sixth Amendment Right to Counsel.*

Judge Holder's inquiry into Mr. Kunstler's political views and those of the respondent, and his open disapproval of those views, cannot be made the basis for denying Mr. Kunstler admission *pro haec vice* to the Indiana federal district court. This Court has squarely held in *Baird* v. *State Bar of Arizona,* 401 U.S. 1 (1971), that political belief or membership in political organization cannot be used as the basis for the denial of access to a profession, specifically the practice of law:

> The First Amendment protection of association prohibits a state from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs. 401 U.S. 1, 6.

See also, *United States* v. *Robel,* 389 U.S. 258 (1967); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967).

Moreover, this Court has consistently held that the practice of law cannot be restricted in violation of federally

protected rights. See *Sperry* v. *State of Florida ex rel. the Florida Bar*, 373 U.S. 379 (1963) (state regulation of practice of patent law cannot restrict federal regulations). And whether the practice of law is viewed as a "right" or a "privilege", regulatory rules that arbitrarily restrict that right are constitutionally invalid. See *Schware* v. *Board of Examiners of New Mexico*, 353 U.S. 232 (1957).

CONCLUSION

It is impossible to escape the conclusion that Judge Holder refused to permit Mr. Kunstler to appear in this case because he did not approve of Mr. Kunstler's controversial views. Whether or not a judge approves of a lawyer's views and whether or not he thinks a defendant would be better off with a different attorney, he cannot arbitrarily deny that defendant counsel of his choice. Mr. Kunstler's comments were so far removed from what the fair trial-free press rules were designed to cover that they cannot lead to any proscription, let alone the sanction that was enforced here. Under the guise of protecting the fair trial-free press rules, petitioner urges this Court to jeopardize the rights of lawyers and clients throughout the nation to secure counsel of their choice. If this Court reverses the decision below, it will strike a more serious blow to the fair administration of justice than any evil associated with pre-trial publicity. This Court should not jeopardize the rights of all Americans because it might disapprove of the comments of a single controversial lawyer.

For the reasons set forth above, the judgment below should be affirmed.

Respectfully submitted,

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